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No. 91-999

JAN 21 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GARMAN CONSTRUCTION COMPANY,
Petitioner,

v.

WILLIAM F. MARTIN, GEORGE F. HUTCHESON, RAY JOHNSON, as Trustees, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Associated Builders and Contractors, Inc. ("ABC") by undersigned counsel, hereby moves pursuant to Court Rule 37 for leave to file a brief as *amicus curiae* in support of the Petition for Writ of Certiorari in the above-captioned matter. As grounds for this motion, ABC states as follows:

1. ABC is a national trade association representing more than 17,500 construction industry contractors, suppliers and related firms. ABC members adhere to the "merit shop" philosophy, that construction work should be awarded on the basis of merit, without regard to union or non-union status.

2. A significant portion of ABC's members, like the Petitioner, are either parties to collective bargaining agreements and trust agreements or have previously been parties to such agreements or trusts, prior to lawfully

terminating their union relationships. ABC thus has a significant interest in promoting the proper interpretation of federal labor laws generally and the laws pertaining to the termination of collective bargaining relationships and trust fund contributions in particular.

3. ABC seeks to file this brief as *amicus curiae* in order to correct what it believes to be an erroneous ruling below on an issue of substantial importance to the construction industry. Specifically, ABC believes that the decision below conflicts with decisions of this Court and decisions in other circuits, by imposing continued trust fund contribution requirements on a construction industry employer after that employer has lawfully terminated its collective bargaining relationship. As is more fully set forth in ABC's brief, attached hereto, the district court's ruling is contrary to established law and violates public policy by threatening to undermine the carefully defined relationship between ERISA and the NLRA. As a result, the decision below will jeopardize the bargaining relationships of many employers in the construction industry.

4. ABC has informed counsel for all parties of its intent to file this *amicus* brief. The Petitioner has consented to this filing but the Respondents have declined to do so.

Wherefore, for the reasons above stated, ABC requests that its motion for leave to file its brief as *amicus curiae* be granted.

Respectfully submitted,

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QUESTION PRESENTED

The Amicus adopts the question presented set forth in the Petition.

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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

Associated Builders & Contractors, Inc. ("ABC"), is a national trade association of more than 17,500 construction industry contractors, suppliers and related firms. Many ABC members, like the Petitioner, have entered into collective bargaining agreements with labor unions and have either lawfully terminated such relationships or have a present interest in understanding their legal right to do so in the future. Many ABC members also contribute to multi-employer trust funds and have a

significant interest in lawful enforcement of trust fund obligations in a manner which is consistent with the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA).

ABC is concerned that the decision below conflicts with decisions of this Court and with decisions of other Circuits by imposing continued trust fund contribution requirements on a construction industry employer who has lawfully terminated its collective bargaining relationship. Such a holding threatens to undermine the carefully defined relationship between ERISA and the NLRA and may jeopardize existing bargaining relationships in the construction industry.

Significant numbers of contractors may be affected by the decision of the court below. It is a common practice for employers in the construction industry to operate under so-called "pre-hire" agreements with particular unions, with as few as one individual covered by each agreement. In addition, employee decertification elections may take place during the term of collective bargaining agreements, and the NLRB recorded 540 decertification elections in 1990 alone.

STATEMENT OF THE CASE

The Amicus adopts the Statement of the Case set forth in the Petition.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER AN EMPLOYER'S LAWFUL TERMINATION OF A BARGAINING RELATIONSHIP WITH A UNION ALSO TERMINATES ANY OBLIGATION TO MAKE TRUST FUND CONTRIBUTIONS UNDER THAT UNION'S COLLECTIVE BARGAINING AGREEMENT, AS PRESENTED BY THIS CASE, IS OF GREAT IMPORTANCE TO CONSTRUCTION INDUSTRY EMPLOYERS AND IS IN CONFLICT AMONG THE CIRCUITS

This petition presents an issue of great importance to the construction industry. The court below has held that an employer can be obligated to continue trust fund contributions as a result of a collective bargaining agreement with a union, even after the employer has lawfully terminated its collective bargaining relationship with the union, thereby removing a prerequisite to enforcement of that agreement. The Seventh Circuit's holding is inconsistent with prior decisions of this Court and the decisions of other circuits and threatens many construction industry employers with inconsistent obligations under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* This Court should grant the Petition in order to resolve the conflict created by the decision of the court below.

This Court has previously held that ERISA itself does not compel the "promise to contribute" on the part of employers, but that such obligations on the part of employers must be found in existing collective bargaining agreements with lawfully recognized labor organizations. *See Laborers Health and Welfare Trust Fund v. Ad-*

vanced Lightweight Concrete Co., 484 U.S. 539 (1988); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982). Numerous Courts of Appeals have interpreted these holdings as prohibiting enforcement of trust fund contribution claims where the collective bargaining relationship on which those claims depend has been lawfully terminated. *See Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557 (9th Cir. 1984); *Local 92 Ironworkers v. B&B Steel Erectors, Inc.*, 850 F.2d 1551 (11th Cir. 1988); *Washington Area Carpenters' Welfare Fund v. Overhead Door*, 681 F.2d 1, 9 (D.C. Cir. 1982).

In the present case, the National Labor Relations Board properly held that the Petitioner-employer lawfully terminated its collective bargaining relationship with the Operating Engineers Union. (App. 27a-28a). Once the Board made that finding, the Operating Engineers' agreement with the Petitioner became unenforceable as a matter of law, including the agreement to make trust fund contributions. *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co., supra*, 746 F.2d at 565-6.

In holding to the contrary, the Seventh Circuit decision also conflicts with numerous cases decided in the context of employee decertification elections, another means by which collective bargaining relationships can be lawfully terminated during the term of a collective bargaining agreement. In *Sheetmetal Workers' Int'l Assoc., Local No. 162 v. Jason Manuf., Inc.*, 900 F.2d 1392 (9th Cir. 1990), for example, the contractor's employees voted to decertify their union prior to the expiration of their collective bargaining agreement. The Ninth Circuit held that the contract "was void after decertification of the union". *Id.* at 1400. The Court further held:

> Any right to recognition as bargaining agent, which the Plaintiff unions secured by virtue of their contracts, ceased and became inoperable on decertifica-

> tion. . . . An implied condition of the contracts was the continuance of that status as such certified representative . . . .

Other courts of appeals have similarly recognized that decertification voids a collective bargaining agreement and thus terminates an employer's obligation to continue making trust fund contributions based upon that agreement. *See, e.g., Baltimore Rebuilders, Inc. v. NLRB*, 611 F.2d 1372, 1377 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) (statements that an employer would no longer contribute to a pension fund if the union was decertified held to be "legally correct", because the "decertification election made renewal of the pension contribution clause an impossibility"). *See also Central States Southeast and Southwest Area Pension Fund v. Central Transport, Inc.*, 68 B.R. 95, 97-98 (M.D.N.C. 1986).

For the same reasons in the present case, the court below should have found that the enforceability of the collective bargaining agreement's trust fund obligations ended upon the NLRB's determination that the employer lawfully terminated its bargaining relationship. Instead, the Seventh Circuit's opinion determined that the NLRB decision should be given no weight in this case because the Board did not address the "ERISA" issue. (App. 7a-10a). Contrary to the court's holding, however, the "issue of a potential remedy under ERISA" was entirely contingent on the existence of a continuing collective bargaining relationship between the employer and the union. Thus, the NLRB's finding that the employer lawfully terminated its relationship with the union should have dictated the outcome of any subsequent trust fund collection action. Absent any continuing collective bargaining relationship, no enforceable collective bargaining agreement could be said to exist and no trust fund obligation could be imposed.

Similarly, the Court below erred in relying on the Board's finding that a "binding agreement" existed prior

to the employer's lawful termination of its bargaining relationship with the Union. (App. 8a). Upon the lawful termination of the bargaining relationship between the employer and the union, as found by the Board to have occurred, the *formerly* binding agreement became void and unenforceable as a matter of law.

Thus, the Seventh Circuit mischaracterized the significance of the Board's decision and confused the relationship between the NLRA and ERISA. These errors led the court below to reach an unsupportable result, in direct conflict with decisions of this Court and other circuits.

As a result of this decision, absent review by this Court, employers will be understandably reluctant to enter into collective bargaining agreements containing trust fund obligations in the construction industry. Clear guidance is required concerning the nature of employers' obligations and their ability to terminate collective bargaining relationships. The Seventh Circuit's opinion, by creating a conflict with previous decisions, renders such guidance impossible and significantly jeopardizes collective bargaining relationships in the construction industry.[1]

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[1] As noted above, significant numbers of contractors could be affected by the decision, because of the large number of one-man units and/or decertifications in the industry each year.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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